



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 16, 1998

Mr. John Speed P. E.
Executive Director
Texas Board of Professional Engineers
P. O. Drawer 18329
Austin, Texas 78760-8329

OR98-1470

Dear Mr. Speed:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 116326.

The Texas Board of Professional Engineers (the "board") received a request for information relating to file number B-13295. The board created this investigation file upon receiving a complaint about the requestor. You claim that the submitted documents from the investigation file are excepted from disclosure under section 552.101 of the Government Code in conjunction with the informer's privilege, V.T.C.S. art. 3271a, § 22A(c), and a board rule. We have considered your arguments and have reviewed the documents at issue.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses statutes and regulations that deem information confidential. The Board is responsible for licensing professional engineers in accordance with the Texas Engineering Practice Act, V.T.C.S. article 3271a. The Seventy-fifth Legislature amended V.T.C.S. article 3271a to provide as follows:

Sec. 22A. (a) The Board shall keep an information file about each complaint filed with Board relating to a license holder.

(b) If a written complaint is filed with the Board relating to a license holder, the Board, at least as frequently as quarterly, shall notify the parties to the complaint of the status of the complaint until final disposition unless the notification would jeopardize an undercover investigation.

(c) The Board shall adopt rules that permit the Board to receive

and investigate confidential complaints against license holders or any other who may have violated this Act. The Board shall maintain the confidentiality of the complaint during the investigation of the complaint.¹

V.T.C.S., art. 3271a, § 22A (footnote added). The board in turn amended title 22, section 131.171 of the Texas Administrative Code to provide as follows:

(a) Complaints alleging violations of the Texas Engineering Practice Act (Act) or board rules must be made in good faith and be accompanied by sufficient information and factual evidence for the executive director to determine if probable cause exists. The board is not responsible for proving the basis of a complaint. If probable cause cannot be found, the executive director shall dismiss the allegation without further action.

(b) Complaints shall normally be submitted in writing along with copies or originals of all supporting evidence; however, the executive director may initiate an inquiry based on any information establishing probable cause.

(c) The board may proceed or not proceed with an investigation, regardless of any civil or criminal actions with any of the parties involved. Withdrawal of a complaint shall not impact an on-going investigation.

(d) The board will receive and investigate confidential complaints against license holders or any other person who may have violated this Act. The board shall maintain the confidentiality of the complaint during the investigation of the

¹The effective date of this amendment to V.T.C.S. article 3271a is September 1, 1997. Act of May 13, 1997, 75th Leg., R.S., ch. 344, 1997 Tex. Sess. Law Serv. 1462, 1473 (Vernon). The session law also provides as follows:

Section 29. The change in law made by this Act applies only to a violation of the Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes) or a rule adopted under that Act that is reported on or after the effective date of this Act. A violation that is reported before that date is governed by the law in effect on the date the violation was reported, and the former law is continued in effect for that purpose.

Id. at 1473. The board received the complaint in file B-13295 after September 1, 1997. Thus, the amendment to V.T.C.S. article 3271a is applicable to the complaint.

complaint. The investigation phase of the complaint shall be considered complete for the purposes of maintaining confidentiality when formal charges have been filed.

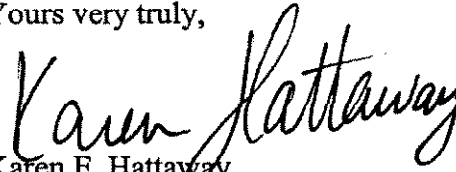
22 Tex. Reg. 8054 (1997) (to be codified as an amendment to 22 Tex. Admin. Code § 131.171) [hereinafter referred to as section 131.171]. You characterize the investigation of the requestor as a "pending enforcement inquiry." Based upon this representation, we conclude that section 131.171(d) makes the submitted documents confidential until such time as formal charges are filed.

You also claim that the informer's privilege protects the identity of the individual who filed the complaint against the requestor. The informer's privilege, incorporated into the Open Records Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 (1988) at 3, 208 (1978) at 1-2. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 (1981) at 2 (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 (1990) at 2, 515 (1988) at 4-5.

The complainant alleges that the requestor is in violation of the Texas Engineering Practice Act, V.T.C.S. article 3271a. The board is currently investigating the complaint and has the power to impose administrative and criminal penalties for a violation of V.T.C.S. article 3271a. *See* V.T.C.S. art. 3271a, §§ 22C, 23. Under these circumstances, we conclude that the complainant's identity is excepted from disclosure under section 552.101 of the Government Code in conjunction with the informer's privilege. We have marked the identifying information that the informer's privilege protects. Finally, we note that the informer's privilege will continue to protect the complainant's identity even after the board files formal charges and section 131.171(d) no longer applies to the submitted documents.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, reading "Karen Hattaway". The signature is written in a cursive, flowing style.

Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/mjc

Ref: ID# 116326

Enclosures: Submitted documents

cc: Mr. W. K. Berg
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(w/o enclosures)